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COMMENTS OF THE BUREAUS OF COMPETITION, CONSUMER PROTECTION, AND ECONOMICS OF THE FEDERAL TRADE COMMISSION

COUNCIL OF THE DISTRICT OF COLUMBIA

A PROPOSED BILL, 6-317, TO REVISE THE LAWS OF THE DISTRICT OF COLUMBIA RELATING TO HEALTH OCCUPATIONS

November 22, 1985

These comments represent the views of the Bureau of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

The Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission ("FTC") appreciate the opportunity to comment on competition and consumer issues involved in the District of Columbia Council's hearings on the regulation of health occupations. Our comments are directed at proposed Bill 6-317, which would create specific licensing requirements for expanded role nurses (nurse midwives, nurse practitioners, and nurse anesthetists), establish an administrative structure for the regulation of such nurses, and change the composition of the existing regulatory boards for physicians, dentists, and nurses.

We address in particular the provisions of the proposed Bill that relate to the practice of expanded role nurses and their relationships with physicians. The proposed Bill sets forth required levels of collaboration between physicians and expanded role nurses and establishes a joint committee composed of physicians, expanded role nurses, and a representative of the District of Columbia Department of Consumer and Regulatory Affairs to create guidelines for promulgation by the Mayor that would further define the collaboration requirements. We discuss below our general concern that the licensing requirements for expanded role nurses should not unnecessarily restrict the flexibility of participants in the health care market to determine the best method of providing high quality health care. In addition, we discuss two specific provisions of proposed Bill 6-317 that may unnecessarily interfere with consumers' access to the services of expanded role nurses.

The FTC's interest in the proposed Bill stems from its responsibility to enforce the antitrust laws. Through its investigations and concern with the economic impact of anticompetitive conduct in the health professions, the FTC has developed considerable knowledge about competition in the provision of health care. In this regard, among other things, the Commission has taken actions to stop physician boycotts and other anticompetitive activities aimed at limiting competition from alternative health care providers.[1] In addition, the FTC has prepared reports and economic studies analyzing competition in the health care field,[2] and has offered its views on regulations governing health care professionals in other jurisdictions.[3] Because increased competition is likely to benefit the public, tne Federal Trade Commission seeks to work with groups in both the public and private sectors to remove obstacles that unnecessarily hinder competition among licensed health care providers practicing subject to the requirements of the law.

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1 See, e.g., State Volunteer Mutual Insurance Co., 102 F.T.C. 1232 (1983) (consent order) (pronibiting physician-owned malpractice insurance company from discriminating against physicians affiliated with self-employed nurse midwives).

2 See, e.g., Competition Among Health Practitioners, Lewin and Associates, Inc. for the FTC (February 1981); Pollard and Leibenluft, Antitrust and the Health Professions (July 1981).

3 See, e.g., Comments of the Boston Regional Office, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission to the Board of Registration in Medicine of the Commonwealth of Massachusetts (Dec. 14, 1984) (Comments on proposed regulations concerning expanded role nurses and other non-physician health care providers).

Competition and Expanded Role Nurses

We commend the Council's efforts to recognize and authorize the expanded practice of nursing where appropriate. On the other hand, we believe that the Council should be careful in its efforts to regulate expanded role nurses not to impose unnecessary restrictions on their practice that would prevent consumers from benefiting from these nurses' fully utilizing their skills.

In offering these comments the Bureaus do not attempt to suggest the particular standards, if any, that the Council should adopt to govern physician supervision of expanded role nurses. We are not in a position to offer advice on that ultimate determination, insofar as delineating the appropriate standards may involve quality of care considerations and choices that turn on medical safety questions. However, we wish to point out that this proposed legislation may have an impact on competition, consumer choice, and the ability of physicians and hospitals to deliver high quality health care at reasonable prices. In view of the potential benefits of the practice of expanded role nurses in conformance with their education, training, and experience, we believe that any aspects of proposed Bill 6-317 that might unnecessarily restrict these professionals in their work with physicians, or unnecessarily limit the procedures that they are allowed to perform, should be analyzed very carefully.

We urge the Council to look carefully and seriously at the benefits, in terms of increased output, quality of services, and lower prices, that can arise when competing physicians practice

in conjunction with expanded role nurses and from competition between physicians and other licensed health care providers. Competition from expanded role nurses could benefit consumers by increasing the number of treatment alternatives available to patients, and by improving the efficiency with which quality health care can be delivered.

Encouraging the presence of expanded role nurses in the market, where appropriate, may have many beneficial effects on health care delivery that will enable consumers to obtain health services in ways and at prices that might not otherwise be available. As these providers begin to practice in greater numbers, more health care personnel should be available to address the problems, where they exist, of maldistribution in the provision of primary care. Patients visiting private office practices, outpatient surgery centers, and hospitals should benefit from a broader range of choices. Physicians practicing in conjunction with qualified non-physician health care providers should be able to increase their productivity and enhance their ability to serve their patients efficiently. These physicians may be able to concentrate on more complicated, high risk procedures for which their training is more valuable. Faced with competition from physicians practicing in conjunction with expanded role nurses, other physicians may choose to expand the range of services they offer or to find ways to lower their prices. Consequently, consumers may have a broader range of options in selecting the medical care they require.

The Potential Impact of Regulation of Expanded Role Nurses

We understand that currently physicians in the District of Columbia work in private office practice and other out-of-hospital settings with expanded role nurses to provide medical care to their patients in a manner they, and their patients, believe is most effective. Similarly, it appears that the District's hospitals and their professional staffs currently have the flexibility to define the scope of physician supervision of expanded role nurses within their institutions in order to furnish the high quality services and health care personnel that the local market demands. Moreover, the District of Columbia has taken action to ensure that expanded role nurses can play a role in the health care marketplace by prohibiting discrimination in the granting of hospital clinical privileges and staff memberships to certified practitioners who provide health care services that are closely related to those provided by physicians.[4]

The proposed Bill enumerates specific tasks that expanded role nurses are authorized to perform, sets forth specific levels of collaboration with physicians, and provides for further definition of the collaboration levels to be developed by the joint committee. We urge the Council to examine the potential impact of substituting such specific regulation for the current flexibility of the market. In this regard, we encourage the Council to consider whether the provisions of the proposed Bill

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[4] D.C. Code Ann. § 32-1307 (1985).

may unnecessarily restrict the expanded practice of nursing. Unnecessary restrictions on expanded role nurses could lessen valuable competition in the provision of medical care and thereby injure consumers. Also, limitations on practice resulting from unnecessarily restrictive regulations may discourage highly qualified and competent individuals from entering allied health professions -- or from practicing in the District of Columbia -- because they may be unable to utilize fully their skills and training. This could harm consumers by decreasing the number and quality of health care providers. In view of the proposed Bill's potential impact on competition in the District, we believe that it is important to consider whether these new restrictions are necessary to protect the public.

We also note that proposed Bill 6-317 would require that "[n]o hospital, physician or health care institution in the District may adopt levels of collaboration inconsistent with the guidelines of the joint committee [of physicians and nurses]."[5] This provision appears to prohibit these entities from adopting arrangements that involve closer supervision or collaboration than that called for by committee guidelines. It would appear, for example, to deny a physician in private practice the ability to determine that for his or her particular practice the appropriate level of collaboration with the expanded role nurse should be higher than the standard set by the joint committee. By preventing physicians from tailoring their collaboration

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5 Section 6-601(h).

agreements to the needs of their individual practices, this provision might actually serve to discourage physicians from entering into practice arrangements with expanded role nurses. Hospitals, health maintenance organizations, and other entities would also be precluded from establishing different standards for collaboration between physicians and expanded role nurses. Requiring a single standard for collaboration without regard to existing patterns of collaboration that may exceed the joint committee's standards would likely disrupt quality of care controls unnecessarily. In general, competition and consumers are best served by allowing health care providers flexibility in structuring practice arrangements subject to meeting standards of safety and quality that are reasonably required to protect the public.

Additional Issues Raised by Proposed Bill 6-317

In addition to the general concerns discussed above, there are two additional provisions of the proposed Bill that may limit competition and effective consumer choice. First, Title 6 of the proposed Bill, which would require the nurse anesthetist to perform his or her duties in "direct collaboration" with a physician who must be an anesthesiologist,[6] would have the effect of mandating the physical presence of an anesthesiologist

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[6] See 6-603(b). Title 1 defines "direct collaboration" as meaning "the principal collaborator is available on the premises and within vocal communication of the other collaborator." See 1-101(2)(B).

whenever services are provided by a nurse anesthetist.[7] Requiring supervision by an anesthesiologist in all cases, regardless of the circumstances or necessity for such supervision, absent evidence that such supervision is always necessary, likely would raise the cost of anesthesia services and possibly make them more difficult to obtain. The proposed Bill would restrict the settings in which physicians in specialties other than anesthesiology could utilize the services of a nurse anesthetist. Such settings may include, for example, the use of anesthesia for minor surgical procedures performed in office-based practices or in newly developing ambulatory surgery centers. Moreover, surgeons and other non-anesthesiologists who currently may supervise nurse anesthetists would no longer be able to do so.

This limitation on non-anesthesiologist physicians appears to represent a substantial departure from the general approach used in the regulation of physicians and other health professionals. In general, state laws and regulations neither restrict performance of medical services or procedures to physicians in any medical specialty nor limit to certain specialities authorization to collaborate with licensed non-physician health professionals. Thus, it is apparently generally believed that these judgments are best left to hospitals and

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7 The proposed Bill also would require that a nurse anesthetist enter into a protocol under which he or she is supervised by an anesthesiologist. See 6-602(a)(2). By entering into a protocol with a nurse anesthetist, the anesthesiologist becomes the nurse anesthetist's principal collaborator. See 6-602(a)(1).

their professional staffs, and the professional responsibility of individual practitioners, within the overall legal and economic framework of the health care marketplace. We urge the Council to consider carefully the need for this provision.

Second, certain provisions in proposed Bill 6-317, which specify the authority and responsibility of the physician collaborator for all specific tasks, could effect changes in malpractice liability[8] that could hinder the practice of expanded role nurses. Currently, a physician is likely to be liable for the actions of a supervised nurse only if he or she is in control of the nurse's specific activities, and not merely because he or she is supervising the medical procedure. See Monk v. Doctors Hospital, 403 F.2d 580 (D.C. Cir. 1968). We therefore encourage the Council to consider the effects of these provisions on existing law.

In sum, appropriate utilization of non-physician health care providers may lead to substantial consumer benefits. Both new consumer options and competitive pressures on practitioners already in the market have the potential for providing important improvements in consumer welfare in the health care field by

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8 The proposed Bill gives the collaborating physician responsibility for "the overall medical direction of the care and treatment of the patient," Section 6-603, and for maintaining overall responsibility for "authorizing and directing the performance of specific tasks [by the expanded role nurse] and determining whether they were performed in an acceptable manner," Section 1-101(2). While proposed Bill 6-317 may specifically be referring to responsibility in a professional or medical sense only, it could result in supervising physicians being held legally responsible, and thus liable, for all actions of expanded role nurses under their supervision.

lowering costs and improving quality. With health care now consuming over ten percent of the Gross National Product, we should do everything possible to maintain physicians' abilities to structure efficiently their relationships with qualified nurse midwives, nurse practitioners, and nurse anesthetists.

We thank the Council for consideration of these comments.